

STATEMENT OF
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CHAIRMAN
SENATE SPECIAL COMMITTEE
ON THE YEAR 2000 TECHNOLOGY PROBLEM

LITIGATION AND THE YEAR 2000 PROBLEM
U.S. SENATE COMMITTEE ON COMMERCE
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Thank you, Mr. Chairman, I salute you for exploring this issue, and for inviting me to testify on the subject of the year 2000 technology problem. As you know, my concern about the Year 2000 problem began in 1996. As chairman of the Senate Banking Subcommittee on Financial Services and Technology, I held a total of eight hearings on the issue as it relates to financial services over a year and a half period. Senator Dodd and I came to the unavoidable conclusion that the Y2K matter required dedicated oversight beyond the scope of the Subcommittee. The Senate established the Special Committee on the Year 2000 Technology Problem in April 1998. I am honored to serve as its chairman, an privilege to serve with Senator Dodd as its vice-chairman.

The Special Committee held nine hearings last year to explore the Year 2000 readiness of the nation's critical infrastructures and key economic sectors. Including, utilities, health care, telecommunications, transportation, financial institutions, general government, and general business sectors.

The details of what we learned so far are contained in a report we plan to issue publicly within the month, but our hearings are continuing as this is very much a moving target. I will take advantage of this opportunity to briefly outline our findings to date. I am now more optimistic than I once was, but a lack of data in numerous areas leads me to continue to be wary of the unknown. Nearly all affected industries and organizations started Y2K remediation too late. Even the sectors that started early and appear to be in the best shape, such as the financial services sector, include individual companies that lag in their Y2K planning. There are exceptions to both good and bad, and we can only speculate what will actually happen.

For this reason, I feel strongly that concerned citizens have the right and responsibility to contact

those companies whose products and services they depend on, inquire into their Y2K preparedness, and receive a straightforward, honest response. We have made the dissemination of Y2K related information a priority of the Y2K Committee. Information is the only antidote for panic. A good first step was the introduction of the CRASH Protection Act of 1997, which ultimately resulted in the SEC's strong stance on Y2K disclosure statements. I will continue to encourage publicly traded companies to provide their customers and investors with forthright disclosure statements. I have written to Chairman Levitt both commending him for his continued vigilance, and encouraging greater scrutiny of Y2K disclosure statements, especially those that attempt to gloss over their Y2K issues by providing little or incomplete information on their Y2K preparedness. I request that a copy of that letter be placed into the record of today's hearing.

The Commerce and the Judiciary committees deserve substantial credit for bringing the legal issues surrounding the Y2K problem into the spotlight. Not only is it important that we find a reasonable and just means of handling the potential Y2K tidal wave of litigation which threatens to overwhelm our judiciary system, we cannot forget that time and money spent on preparing for endless lawsuits and counter-suits is time and money that is not invested in research and development of Y2K solutions.

We started hearing concerns about litigation in connection with the Year 2000 problem at our very first hearing. Different sectors of industry told us they were hesitant to disclose and exchange information about their year 2000 readiness-information that would help others in the remediation process-because they feared lawsuits if their disclosures proved inaccurate.

With support from the White House, Senator Dodd and I introduced S. 2392, the "Year 2000 Information and Readiness Disclosure Act." The Act promotes the free disclosure and exchange of information related to year 2000 readiness and provides some liability protection for a limited time period for the release of certain types of information. The President signed the bill into law on October 19, 1998, and businesses in all sectors tell us that it has helped, but that more help is needed.

Disclosure of Year 2000 readiness information is only one part of the problem. The fear of litigation is so great that it threatens to eclipse the goal of remediation. While we believe that remediation and contingency planning are of paramount importance, our findings suggest that the fear of litigation is real and justified.

There is no question that many businesses are going to wake up after their New Year's Eve celebrations with morning-after Y2K headaches. As we discuss in our report, almost a quarter of all companies worldwide have yet to start any Y2K effort. According to the Gartner Group report, between 30 and 50 percent of all companies worldwide will have at least one mission critical failure; that figure drops down to 15 percent for companies in the United States. It is estimated that correction of these failures will take at least 3 days in most cases, and that the cost per incident could soar into the millions.

However, the problem extends far beyond those companies with mission-critical failures. Our economic sectors are inextricably bound together. The financial services sector depends on its ability to exchange electronic information between its members and with government agencies. The manufacturing sector depends on just-in-time inventory and the exchange of electronic information to create a tight chain between suppliers, processors, manufacturers, distributors, retailers and customers. While this speaks well of the time and money saving strategy of outsourcing and specialized division of labor, it also means that one company's inability to fulfill its business contracts opens it and ALL the companies that depend upon it to liability. The result is a litigation domino effect where the Y2K failures of one company can topple all of its business partners.

Even if Y2K-related disruptions last only a few days, a broad range of businesses and individuals will suffer some kind of economic injury. In this country, the recourse for injury is often not an apology, but a lawsuit. If the resulting litigation follows a path similar to current civil liability trials, Y2K litigation will last for years into the next millennium.

The estimated cost of this exercise has been estimated at a staggering \$1 trillion. That's more than the total estimated annual direct and indirect costs of all civil litigation in the United States—\$300 billion per year, or three times over the current load of cases that U.S. courts now handle. That's also three times more than the current insurance pool in the United States.

This estimate is so high because every industry in our economy has a legal stake in the Year 2000 problem and because our economy ties so many businesses together. While one trillion dollars is a lot of money, that's only the estimated cost of litigation that will be over and done with in a few years. The more insidious cost of this litigation explosion is the cost to the entire economic infrastructure.

Companies that have made every reasonable effort to become Y2K compliant but experience failures anyway, could end up in court and be put out of business by the costs of litigation. Critical suppliers to key industries might be lost altogether, and entire industries might be set back, causing an economic downturn with repercussions lasting well into the millennium. Money that is spent on litigation cannot be spent on research and development. Money that is spent on litigation cannot be spent on training and retaining quality personnel. Money that is spent on litigation cannot be invested in entrepreneurial enterprises. The U.S. economy simply cannot afford to pay the price of a litigation explosion.

Why is Congress being asked to act on this issue? The Y2K issue does not create new or unusual causes of action, nor does it involve factual scenarios that are more complicated than the ones the courts address every day. The reason is twofold. First, right now, almost 11 months before the year 2000, business decisions are being colored by consideration of the legal ramifications of the Y2K problem. It is becoming a huge distraction fraught with uncertainty, even when there are no actual Y2K failures affecting business, and very few lawsuits. Second, when the Y2K failures actually come, nearly all of them are going to converge around a single date.

That means most of the lawsuits are going to be filed in roughly two years. Our system of justice is simply not equipped to handle such an influx of litigation. I have three points that I think must be considered in reviewing any legislative proposals concerning Y2K litigation

Punish those who are negligent. Since the best deterrent to Y2K litigation is Y2K remediation, we cannot consider any measure that could be interpreted by businesses as an excuse to stop the remediation projects they've already begun.

For many businesses, especially small businesses, there is still time to fix the problem. So Congress should not make sitting back and doing nothing a more attractive option by limiting the liability of companies that have not been responsible enough to take care of their own business.

However, the flip side to this argument is that companies that take reasonable efforts to remediate their Y2K problems ought to get credit for having done so. One way of doing that is to limit their liability if, despite all their efforts, they have a Y2K-related failure that causes economic injury to another party. It is counter-productive to punish a company that has acted responsibly -- and still experiences a failure with -- punitive damages. Make them liable only for the portion of economic damages for which they are responsible. Punitive damages are meant to discourage similar bad behavior in the future. With Y2K, as a one time event, punitive damages are not appropriate.

Of course, we ought to do everything we can to encourage companies, right now, to take proactive measures to prevent litigation. Anything we can do to encourage business partners to solve their mutual problems now, will help. As you examine this issue, consider providing additional incentives or protections to companies to disclose information to each other. Also, look at providing incentives for people to engage in some type of alternative dispute resolution that avoids litigation.

Again, Mr. Chairman, I salute you for moving on this issue, and for inviting me to testify.